FILED
MAR 25 1974

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. ~~73~~ 1433

ISAAC J. HURT

Petitioner

vs.

S. S. BRITTON, WARDEN
U. S. FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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III.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the within petition for a Writ of Certiorari was served this day on the Solicitor General of the United States, Washington, D.C. and on the United States Attorney for the District of Kansas, P. O. Box 1537, Topeka, Kansas, 66601; Jon Paul Tangen, Capt. JAHC, United States Army, Washington, D.C. 20310; by regular U.S. Mail.

.....

HARVEY B. WOODS
Attorney for Petitioner

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.----------

ISAAC J. HURT

Petitioner

vs.

S. S. BRITTON, WARDEN
U. S. FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION

Petitioner, Isaac J. Hurt, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit against Petitioner filed January 21, 1974.

OPINION BELOW

The opinion of the District Court is reproduced herein at pages 14-19 in the appendix and the opinion of the Court of Appeals Tenth Circuit is reproduced at pages 21-22 in the appendix.

JURISDICTION

The judgment of the Court of Appeals, Tenth Circuit was entered on the 27th day of December, 1973. This petition is timely filed within 90 days thereof and jurisdiction is invoked under 28 U.S.C. section 1254.

QUESTION PRESENTED

Did this District Court err in denying relief and dismissing the habeas corpus petition filed by Petitioner on the 29th day of January, 1973, where the basis of said petition was denial of due process of law and denial or equal protection of the law.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI Constitution of the United States
Article I Section 8, Constitution of the United States
Amendment V Constitution of the United States
Amendment XIV Constitution of the United States

STATUTORY PROVISION INVOLVED

Title 18 U. S. C. Section 4202
Title 28 U. S. C. Section 2241
Article 52 United States Code Military Justice

STATEMENT OF CASE

Sgt. Isaac J. Hurt was convicted by an Army Court-Martial Board on the Island of Okinawa on the 2nd day of December, 1955, for rape and murder while perpetrating rape contrary to Sections 118 and 120 of the United States Code of Military Justice and sentenced to be put to death.

Prior to the trial of the case, considerable publicity appeared in the local and military press concerning the case, including pictures and press releases concerning the matter along with the feelings of the local Okinawans about the case.

Based on this publicity, counsel for Appellant moved for a change of venue or in the alternative that a Court-Martial Board be appointed from a Command other than Okinawa. These Motions were denied by the Court.

Appeal was duly made through the United States Court of Military Appeals and findings and sentence was affirmed in each appeal.

Upon review by the President of the United States the sentence was commuted to forty-five years imprisonment at hard labor, without benefit of pardon or parole. (Appendix 1, pp. 11-12)

On January 29, 1973, Application for Writ of Habeas Corpus based upon constitutional questions was filed by Appellant and was subsequently dismissed and relief denied by the United States District Court for the District of Kansas on the 12th day of April, 1973. (Appendix 2, p. 13) Upon appeal to the United States Court of Appeals for the Tenth Circuit, the opinion of the District Court was affirmed (Appendix 4, p. 20). From the affirmance of that opinion and judgment this Application for Writ of Certiorari is taken.

REASON FOR GRANTING WRIT

POINT 1

The Court has the right and authority to review a conviction by a Military Court when such review concerns the Constitutional Rights of the defendant. See Powers vs. Hunter, 178 F. 2d 141.

While it is true the use of Habeas Corpus is not open to determine the guilt or innocence of one convicted by a Court-Martial, *Humphrey* v. *Smith*, 336. U. S. 965, this Appellant was not requesting such relief by his application.

Petitioner's sole request by the Application was for the Court to determine if his constitutional rights were violated, and if so, to remand the matter for retrial within the constitutional guarantees afforded to all citizens, including military

personnel after all military appeals have been exhausted. See *Burns* v. *Wilson* 346 U. S. 137 and *Williams* v. *Heritage* 323 F. 2d 731.

The theory of "full and fair consideration" by the military Courts as a limitation of review by civil Courts has been completely overruled by *Allen* v. *Canfort* 426 F. 2d 635 Cert. Den. 402 U.S. 1008, in which the Court held:

> In view of the confusion surrounding application of the Supreme Court's ruling that civil Courts should not consider constitutional allegations that have been dealt with "fully and fairly" by a military tribunal, a military prisoner's constitutional claims were considered reviewable in Federal Habeas Corpus Proceedings *on the merits*, even though his principal constitutional contention that he had been denied effective assistance of counsel was fully considered by the United States Navy Court of Review. (Emphasis ours.)

Thus the attitude of the Courts has been to determine if constitutional rights have been denied, and if so, to order a retrial of the case.

It is submitted that Naval Personnel are also military and the same rights given to Naval Personnel should also be granted to Army Personnel, and if any constitutional rights have been violated in this matter, the Federal Civil Courts have the right under File 28 U. S. C. 2241 to review proceedings which deny basic constitutional guarantees. See also *Dixon* v. *United States* 237 F. 2d 509, *Power* v. *Hunter*, 178 F. 2d 141.

It is therefore submitted that the Federal Civil Courts can review denials of constitutional rights of persons in the Military Service, when all military appeals have failed and to determine whether due process of law was denied to a person convicted by a military Court.

POINT 2

The Appellant herein was denied due process of law pursuant to Amendment V of the United States Constitution, in the overruling of his Motion for Change of Venue or in the alternative appointment of a Court-Martial Board from a Command other than that in which he was tried

Appellant herein submitted to the Court numerous exhibits which were articles taken from local newspapers concerning his case and it is apparent from the exhibits offered that the feeling of the inhabitants of Okinawa were inflamed against the Petitioner and intense feelings of unrest were prevalent on the Island. (See Original Exhibits Appendix II through XVIII of Record of Trial which were stipulated as representative translations of the Japanese Press. App. Ex. XIX.)

Appellant also submitted Ex. 1, which was stipulated as notes of a staff meeting and press conference held by the Staff of the Judge Advocate General on September 16, 1955, *before trial of the appellant* and a meeting of the Ryukyuan American Community Relations Advisory Council on September 21, 1955.

Appellant's Motion for a Change of Venue or the alternative were denied on the ground that there was no showing that the military shared the local prejudice. (App. Ex. 1, P. 14), however, the Civil Administrator had said that the Commanding General had agreed to subject the criminal to the death penalty. (App. Ex. XVI.) The language used clearly shows the type of Command influence exerted in the trial of this case and shows the abuse of discretion by the trial Court in denying the Motion for a Change of Venue.

This case became the focal point for many political demands and for general resentment at American rule, and the Commanding General recognized these circumstances and that the incident had invoked the distinct possibility of violence, (App. Ex. XX).

In addition, the testimony of one identification witness clearly shows the prejudicial extent of the publicity. He testified that his father told him that the accused was the man who committed the offense and showed the witness a press picture of the accused when it appeared in the local papers, even though that witness previously had been unable to identify the accused at line ups or from pictures shown to him. (R. 76-77).

The feelings in this matter extended beyond the issues of the case. Conviction of the accused and sentencing him to death would abate some of the intense feeling brought on by the incident. To acquit him would be to invite disaster. Denial of a change of venue in a proper case is denial of the right to trial by an impartial jury. See *Downer* v. *Dunnaway* 53 F. 2d 586.

The political situation on Okinawa at the time, being under U. S. protectorate, was detrimental to the defendant's right of a trial conducted in a fair and impartial manner. Defense evidence which tends to show hostility and prejudice against the accused was held to entitle him to trial in another Court. See *U.S.* v. *Reece* 280 Fed. 913.

In *Delaney* v. *U. S.* 199 F. 2d 107, the Court held that it was error to force the defendant to go to trial in the face of mounting adverse publicity, *tinged with political overtones,* even though this publicity could not have been avoided in another district. In the present case, political overtones were paramount in the minds of the accuser and the Board which tried Sgt. Hurt.

Even though all Board members said they could be fair and impartial in their determination of guilt, this would not be dispositive of the matter. See *Delaney* v. *U. S. Supra.*

In this matter, several of the Court-Martial Board, which was in effect a jury, indicated they knew of dissention among the local populace over the case and said they had heard the natives of Okinawa had made a political issue of the case and that they, the Okinawians, were bitter over the matter.

As in *Sheppard* v. *Maxwell,* 384 U. S. 333, where the Court held that prejudicial publicity prevented a fair trial, this case,

by its very nature and locale prevented the accused from receiving a fair and impartial hearing before the Court-Martial Board .

To show the extent of the military concern over the case, the day after trial, the Commanding General requested of the Department of the Army that the accused be kept on Okinawa with view of carrying out the sentence there if finally approved. How much more, politically motivated can we be? To appease the local population with an execution of a political cause would solve some of the unrest and dissention. Tinged with political overtone?

The United States Supreme Court in the case of *Rideau* v. *Louisiana* 373 U. S. 723 held that denial of a change was a denial of due process of law and that Court, relying on a growing number of cases holding that showing of actual prejudice was not a prerequisite to reversal, found that the manner and circumstances surrounding the conduct of the respective trials were inherently prejudicial to the defendant, even though no actual prejudice was shown. See also *Turner* v. *Louisiana* 379 U. S. 466, In re: *Murchison* 349 U. S. 133, *Tumey* v. *Ohio* 273 U. S. 510.

Thus the evidence presented by the accused as to the conditions existing on Okinawa at the time and the concern of the military as to those conditions, clearly shows the trial Court abused its discretion by not granting the accused's Motion for Change of Venue or its alternative and prevented him from receiving that due process of law to which he was entitled under the United States Constitution and the matter should be remanded for new trial.

POINT 3.

The Appellant herein was denied the right to a finding of guilt by unanimous jury in violation of Amendment VI of the U. S. Constitution.

Article 52 of the Uniform Code of Military Justice specifies that an accused can be found guilty by the vote of two-thirds majority of a Court-Martial Board. As per the record in this case the accused was so found.

As a general matter the right to trial by jury in Federal Courts means the right to have the facts in evidence determined by a unanimous verdict. See *Patton* v. *U. S.* 281 U. S. 276, 50 S. Ct. 253.

The question to be determined is whether the Uniform Code of Military Justice, Article 52, is constitutional in the number required for a finding of guilt.

It is true that jury unanimity is not a requisite of due process of law in a State Court, but the Uniform Military Code of Justice was enacted under Article I, Section 8 of the United States Constitution and it is the contention of appellant that this brings that Code within the Federal Rules for the conduct of trials and any deviation therefrom is an unconstitutional exercise of Federal power.

True jury unanimity is not to be equated with the existence of reasonable doubt. See *Holt* v. *U. S.* 218 U. S. 345 and *Agnew* v. *U. S.* 165 U. S. 36, but a unanimous verdict is required in all federal criminal cases. See *U. S.* v. *Cox* F. 2d 683.

If unanimity is required under all Federal procedures for criminal cases, including the military, then the military is subject to the rules laid down by the Supreme Court in *Johnson* v. *Louisiana* 406 U. S. 356, and Article 52 is unconstitutional and this conviction cannot stand as being in violation of the VI Amendment to the United States Constitution.

Appellant claims that an Army Court-Martial is a federal procedure and therefore subject to federal rules including unanimity of verdict and therefore this case must be remanded for further proceedings.

POINT 4.

The limitation expressed in the Commutation Order of the President of the United States was in violation of Appellant's rights to equal protection of the law under V and XIV Amendment to the United States Constitution.

Title 18, U. S. C. 4202 reads as follows:

> Prisoners eligible: A Federal prisoner other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Obviously appellant has served the number of years to make him eligible for parole under above cited statute, and would be released except for the limitations imposed by the Presidential Commutation Order.

It is the contention of the appellant that the limitation imposed by the Commutation Order deprives appellant of the equal protection of the law and deprives him of due process of law.

The President by executive action cannot deprive a person of their constitutional guarantees, and even the war power does not remove constitutional limitations safeguarding essential liberties, See *Bowles* v. *Willingham* 321 U. S. 503.

Persons serving sentence in a federal Penitentiary in the United States under a Court-Martial sentence are subject to the control of the parole board and not subject to an executive order of the President expressly forbidding parole. See *Jackson* v. *Humphrey* 92 F. Supp. 635, Aff'd. 185 F. 2d 407.

By the commutation limitation, the President attempted to do the very thing which Congress, by enacting *18 U. S. C.*

4202, and the Court by *Jackson* v. *Humphrey Supra.*, expressly said he could not do.

It has been often said, and rightly so, that this is a nation of laws, not men. To attempt to deprive one individual of the benefit of those laws and to attempt to deprive that person of the equal protection and due process negates that old and well proven adage.

Appellant respectfully submits that the limitation imposed by the President of the United States in his order of June 1, 1960, is unconstitutional, and that the defendant having served at least fifteen years of his forty-five year sentence is thereby eligible for parole and entitled to the benefits of Title 18 Section 4202, U. S. Code.

CONCLUSION

Appellant respectfully submits that his constitutional rights are being violated in the above mentioned respects and that he should be entitled to a new trial of his cause within a reasonable time and if this is not accomplished the charges should be dismissed. Appellant is not asking for a dismissal at this time. All he asks this Court to do is to give him those rights and guarantees which are afforded to all citizens of the United States of America, whether they be civilian or military; that is the right to a fair and impartial trial, free from domination of Command influence, prejudicial surroundings and publicity and not tainted with political considerations. Then in the event appellant would be convicted, he, along with those who follow, will realize that truly, we are a nation of laws not men.

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APPENDIX 1

PRESIDENTIAL COMMUTATION ORDER

In the general court-martial case of Sergeant Isaac J. Hurt, United States Army, RA15298423, Battery B, 22nd Anti-Aircraft Artillery Battalion, (Lt) (75MM) (MBL), the proceedings of which were promulgated in paragraph 7, S. O. 213, Headquarters, Ryukyus Command, Fort Buckner, APO 331, United States Army, dated 3 September 1955, as amended, and General Court-Martial Order No. 7, Headquarters, Ryukyus Command, Fort Buckner, APO 331, United States Army, dated 2 February 1956, pursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause 1, of the Constitution, the sentence to be put to death is hereby commuted to dishonorable discharge, forfeiture of all pay and allowances becoming due on and after the date of this action and confinement at hard labor for a term of forty-five years commencing on the date of this action. This commutation is expressly made on the condition that the said Sergeant Hurt shall never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military penal institution (18 U. S. C. 4201 et. seq., 10 U. S. C. 8663, 871, 874), or any acts amendatory or supplementary thereof. As thus commuted, the sentence will be carried into execution. The place of confinement shall be designated by the Secretary of the Army.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
June 1, 1960

A U. S. penitentiary reformatory, or other such institution is designated as the place of confinement. However, the prisoner will be temporarily confined in the United States

Disciplinary Barracks, Fort Leavenworth, Kansas, pending the designation of a Federal institution by the Attorney General. At such time the prisoner will be committed to the designated Federal institution and the confinement served therein, or elsewhere as competent authority may direct.

By Order of Wilbur M. Brucker, Secretary of the Army.

G. H. DECKER
General, United States Army,
Acting Chief of Staff

Official:

BRUCE EASLEY
Major General, United States Army
Acting The Adjutant General

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF KANSAS

CIVIL ACTION FILE No. L-2413

ISAAC J. HURT

Petitioner,

vs.

S. J. BRITTON, WARDEN,
U. S. FEDERAL PENITENTIARY
LEAVENWORTH, KS.,

Respondent.

JUDGMENT

(Filed April 12, 1973)

This action came on before the Court, Honorable Earl O'Connor, United States District Judge, presiding, and a decision having been duly rendered,

It is Ordered and Adjudged that Relief be denied, and that the action be and it hereby is dismissed.

Dated at Topeka, Kansas, this 12th day of April, 1973.

ARTHUR G. JOHNSON
Clerk of Court
/s/ Patricia A. Brooks
Deputy Clerk

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. L-2413

ISAAC J. HURT,

Petitioner,

v.

S. J. BRITTON, Warden
U. S. FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS,

Respondent.

MEMORANDUM AND ORDER

(Filed April 12, 1973)

The petitioner, by his counsel, heretofore filed with this court his application for writ of habeas corpus, and a Rule to Show Cause was issued under order of this court. Respondent has filed an Answer and Return, together with numerous attachments, and petitioner has filed his Traverse. Petitioner also has filed a "MOTION FOR RELEASE FROM CONFINEMENT," predicated upon the respondent's request for an extension of time in which to file it's Answer and Return. Upon examination of these documents, the court makes the following findings and order.

It appears from the application that petitioner is presently in the custody of the Warden of the United States Penitentiary at Leavenworth, Kansas, by or under color of authority of the United States, by virtue of a conviction for rape and murder,

following a trial by General Court Martial, convened at Headquarters, Ryukyus Command, Fort Buckner, Island of Okinawa, in September of 1955. On December 6, 1955, he was sentenced to be put to death and the findings and sentence were approved by the convening authority, the United States Army Board of Review, and the United States Court of Military Appeals. [9 U.S.C.M.A. 735, 27 C.M.R. 3.]

On June 1, 1960, President Dwight D. Eisenhower commuted the death sentence imposed upon petitioner, to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for a term of 45 years. The commutation further provided that:

> "This commutation is expressly made on the condition that the said Sgt. Hurt shall never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States and the Regulations promulgated thereunder governing federal prisoners confined in civilian or military penal institutions (18 U.S.C. 4201 et seq., 10 U.S.C. 8663, 871, 874), or any acts amendatory or supplementary thereof . . ."

Petitioner has sought federal habeas corpus relief on two prior occasions. In L-1695, petitioner argued that the President does not have authority to grant conditional commutations of sentence. The district court denied relief, and the Court of Appeals for the Tenth Circuit summarily affirmed. See *Hurt* v. *Mosely*, No. 71-1307, September 13, 1971. Petitioner also filed an earlier application for habeas relief before the executive commutation became effective. See *Hurt* v. *Davis, Cmdt.*, No. 2821 H.C. – 1960. That petition also was denied.

Petitioner's three-pronged attack upon his present confinement may be summarized as follows:

1. *Denial of due process at his General Court Martial.* Petitioner points to the denial of his motion for a change of

venue or in the alternative for the selection of a court martial board from a command other than that of the Okinawan Command. He couples this argument together with his allegations of "prejudicial pretrial publicity," continuing prejudical publicity during the course of the court martial, and "command influence."

2. *Petitioner's Sixth Amendment rights were violated.* He contends that he was convicted by a two-thirds majority rather than a three-fourths majority, as required by the Uniform Code of Military Justice, and that he was constitutionally entitled to a unanimous jury verdict.

3. *The illegal action of the President of the United States in limiting the Commutation Order from death to 45 years at hard labor without pardon or parole.* Petitioner contends that the express limitation depriving him of all rights, privileges, claims or benefits arising under the parole or suspension or remission of sentence laws of the United States, is an unconstitutional deprivation of his Fifth Amendment rights. His argument is that having served 15 years of the 45-year sentence, he is now eligible for parole and should be entitled to the benefits of 18 U.S.C.A. § 4202.

We must first determine the extent to which we may collaterally review a court martial conviction. In *Burns* v. *Wilson*, 346 U.S. 137, 97 L.Ed. 1508, 73 S.C. 1045 (1953), the rule was clearly established that the duty imposed upon civil courts is to determine whether the military had given full and fair consideration to each of the petitioner's constitutional claims. Civil courts also have jurisdiction to determine whether the military petitioner was denied any basic right guaranteed to him by the Constitution. *Dixon* v. *United States*, 237 F.2d 509 (10th Cir. 1956).

Counsel for the petitioner apparently envisions military courts as inferior federal courts for which we sit as the natural appellate body. This clearly is not the law. While there apparently exists at least some philosophical disagreement over the proper standard of review to be employed by a federal

district court in military habeas, on the whole the courts, including the Tenth Circuit, have shown a reluctance to expand the scope of review. See *King* v. *Mosely*, 430 F.2d 732 (10th Cir. 1970); *Kennedy* v. *Commandant*, 377 F.2d 339 (10th Cir. 1967); *Palomera* v. *Taylor*, 344 F.2d 937 (10th Cir. 1965). As we have stated on prior occasions, the rationale behind limited review by civil courts is that the military authorities have expertise and specialized knowledge in matters of military affairs, the military must maintain a certain critical level of discipline within their ranks, and specific and autonomous jurisdiction has been granted to the military by both the Constitution and by Congress.

Civil courts, of course, may intervene when the military tribunal has no jurisdiction of the person or of the crime or when the actual fact-finding process itself has been invaded by a gross lack of due process. See *e. g. Sweet* v. *Taylor*, 178 F. Supp. 458 (D.C.Kan. 1959); *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965).

From the foregoing, this court is able to conclude the following:

As to petitioner's first contention, each of the alleged errors were given full and fair consideration at each military level of review. Indeed, a more extensive model for full and fair consideration would be difficult to imagine. These contentions were presented and considered not only at the trial level, but at each step of the way leading up to and including the United States Court of Military Appeals. The convening authority referred the record to the Staff Judge Advocate for his review. Thereafter, the findings and sentence were approved by the convening authority and the record was forwarded to the Judge Advocate General of the Army for review by the United States Army Board of Review, which found the findings of guilty correct in both law and fact. Upon the granting of a petition for review by the United States Court of Military Appeals, that court likewise approved the judgment and sentence. Essentially the same arguments now before this court were

presented at each level of review where they were given full and fair consideration.

Although what has already been said would dispose of petitioner's first point, there exists another reason why his contention must fail. Petitioner has failed to present a constitutional claim within the scope of our federal habeas jurisdiction. He alleges a deprivation of due process in the denial of a motion for change of venue, or in the alternative, because the court members were not drawn from outside the immediate command. He predicates this upon "prejudicial pretrial publicity" and "command influence." We, as did the reviewing authorities, fail to perceive anything in the record indicating that pretrial publicity "poisoned the proceeding" or required a change of venue. On the contrary, during voir dire the Law Officer permitted the defense extremely wide latitude in the search for possible prejudice. Only after a full examination did the defense elect not to challenge any member of the Court. No doubt, there was considerable interest in this case not only among the local populace, but also among the military population as well, but such interest is not to be magically equated to "prejudice that poisoned the proceeding." The record reflects that petitioner's first contention alleges no deprivation of a right granted him by the Federal Constitution.

In his second point, petitioner contends he was convicted by a two-thirds majority rather than a three-fourths majority, as required by the Uniform Code of Military Justice. Petitioner misreads the statute in question. Article 52 (U.C.M.J., enacted May 5, 1950) deals disjunctively with the required number of votes to (a) convict and (b) to sentence. Section (a) has two subsections: the first includes the offenses of rape and murder and provides that punishment for either is "death or imprisonment for life as a court martial may direct;" the second provides that a two-thirds majority is adequate to convict. Section (b) deals with the number of votes required for sentencing: the death penalty requires unanimity; confinement in excess of 10 years requires a three-fourths majority; and lesser sentences

require a two-thirds majority. Petitioner's conviction clearly satisfies the Code requirements.

Petitioner's further argument that anything less than a unanimous verdict was a violation of his constitutional rights under the Sixth Amendment is without merit. Where the military court has jurisdiction over the person and the subject matter, as is true in this case, there exists not even a constitutional right to a trial by jury. See *King* v. *Moseley, supra.* For that matter, when there is the right to a jury trial, the Supreme Court in *Johnson* v. *Louisiana,* 406 U.S., 356, 32 L. Ed.2d 152, 92 S.C. 1620 (1972) made it clear that unanimity is not a requisite of due process.

With respect to petitioner's final contention, we note that petitioner has already unsuccessfully tested the legality of his conditional commutation. See *Hurt* v. *Moseley* (10th Cir., 71-1307, September 13, 1971). He may not resurrect this same issue by successive applications or by merely attempting to combine it with new issues. (28 U.S.C.A. § 2244.)

The court concludes that the petitioner was denied no basic right guaranteed him by the Federal Constitution; that his conviction and resulting sentence were valid; and that the petitioner is legally in the custody of the respondent and is entitled to no relief. Furthermore, petitioner's motion for release based upon an extension of time granted the respondents in which to file an Answer and Return should also be denied.

IT IS ORDERED that petitioner's motion for release be denied; that this action be dismissed; and that judgment be entered against the petitioner for costs. The clerk is directed to transmit copies of this Memorandum and Order to all interested parties.

Dated at Kansas City, Kansas, this 11th day of April, 1973.

/s/ EARL E. O'CONNOR
United States District Judge

APPENDIX 4

NOVEMBER TERM – DECEMBER 27, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, and Honorable Oliver Seth, Circuit Judge.

No. 73-1357

ISAAC J. HURT,
Petitioner-Appellant,

v.

S. J. BRITTON, Warden,
UNITED STATES FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS
Respondent-Appellee.

(Filed January 21, 1974)

Upon consideration of the record on appeal and the files of this court, it is ordered that the judgment of the United States District Court for the DISTRICT OF KANSAS be and the same is hereby affirmed pursuant to Rule 8 on the court's own motion.

HOWARD K. PHILLIPS,
Clerk

/s/ LAVON M. IRLBECK,
Deputy Clerk

APPENDIX 5

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER 1973 TERM

No. 73-1357

ISAAC J. HURT,
Petitioner-Appellant,

v.

S. J. BRITTON, Warden,
UNITED STATES FEDERAL PENITENTIARY
LEAVENWORTH, KANSAS
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. L-2413)

(Filed December 27, 1973)

Harvey B. Woods has filed memorandum in opposition to summary affirmance (brief) on behalf of Appellant.

Before LEWIS, Chief Judge, PICKETT and SETH, Circuit Judges.

PER CURIAM

In 1955, appellant Hurt was tried by general court-martial and found guilty of rape and murder. He was sentenced to death, but in 1960 the President of the United States commuted the death sentence to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for forty-five years, with no possibility of pardon or parole.

This is an appeal from the district court's denial of habeas corpus relief. Appellant raises three challenges to his conviction. The first is that pretrial publicity, public attitude, and attendant political pressures made the failure to grant a change of venue or alternatively to select the members of the court from a different command, a denial of due process. Secondly, he contests the validity of his conviction by concurrence of a two-thirds majority of the court. Finally he challenges the authority of the President to commute his death sentence to a sentence of forty-five years without possibility of parole. All three contentions received thorough consideration in the Memorandum and Order of the district court. We have again considered them, and determined that they are without merit. We concur in both the reasoning and conclusions of the court below and adopt its Memorandum.

Upon docketing, appellant was informed of his right to file a memorandum in opposition to summary affirmance. He has responded with a brief. Nevertheless, after a careful and thorough review of the records and files in the case, we are convinced that the judgment of the district court is correct.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1433

ISAAC J. HURT, PETITIONER

v.

S. J. BRITTON, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner, convicted by a court-martial in 1955 of rape and murder, challenges the validity of a Presidential order commuting his death sentence to a sentence of forty-five years' imprisonment without possibility of parole. He also contends that in view of pretrial publicity and political pressure to convict, the court-martial violated due process by denying his motion for a change of venue or, alternatively, for the selection of a court-martial board from another command. Finally, he argues that Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), authorizing conviction by concurrence of two-thirds of the court-martial members, violates his consitutional right to a unanimous verdict.

In 1955, petitioner—then a Sergeant in the United States Army, serving at Fort Buckner, Okinawa—was convicted by court-martial of rape and of murder while

perpetrating the rape, in violation of 10 U.S.C. 920 and 918(4). He was sentenced to death.[1] The conviction and sentence were affirmed throughout the military system of review. Pursuant to Article 71(a) of the U.C.M.J. (10 U.S.C. 871(a)), requiring approval of court-martial death sentences by the President and authorizing him to commute the sentence as he sees fit,[2] President Eisenhower commuted petitioner's death sentence in 1960 to confinement at hard labor for a term of forty-five years, upon the express condition that petitioner "never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States * * *" (Pet. App. 1, pp. 11-12).

Petitioner is presently a prisoner at the United States penitentiary at Leavenworth, Kansas. He would be eligible to be considered for parole except for the no-parole clause of his commutation. See 18 U.S.C. 4202; 10 U.S.C. 858(a). In January 1973, he petitioned for a writ of *habeas corpus* in the United States District Court for the District of Kansas, arguing that his conviction was invalid on several grounds and that the no-parole condition on the commutation of his death sentence was unlawful. The district court denied relief in a memorandum opinion and order (Pet. App. 3, pp. 14-19), and the court of appeals affirmed on the reasoning of the district court (Pet. App. 5, pp. 21-22).

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[1]Under 10 U.S.C. 118, petitioner's crime was punishable by either death or life imprisonment.

[2]Article 71(a) provides:

> No court-martial sentence extending to death or involving a general or flag officer may be executed until approved by the

1. Petitioner contends that under 18 U.S.C. 4202 he is now eligible to be considered for parole and that the no-parole provision of the commutation order is a violation of his right to due process (Pet. 9-10). A similar issue is presented in another case now pending in this Court, *Schick* v. *Reed,* No. 73-5677, in which a serviceman convicted in 1954 of murder and sentenced to death has challenged the validity of a no-parole provision in a Presidential order commuting his sentence to life imprisonment. In that case certiorari was granted on April 22, 1974, to consider the following questions presented by the petition (Schick Pet. 2):

> 1. Whether the no-parole provision contained in the commutation of Petitioner's death sentence is lawful where the underlying death sentence itself is retroactively illegal under *Furman* v. *Georgia,* 408 U.S. 238 (1972), and the only other punishment that could have been imposed at trial was life imprisonment with possibility for parole.
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> 2. Whether the President, acting under his constitutional power to "grant reprieves and pardons," may lawfully commute a sentence to punishment that is not authorized by law.

Our arguments in support of the lawfulness of the no-parole commutation are set forth in the government's memorandum opposing certiorari in *Schick* v. *Reed*

President. He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit, and may suspend the execution of the sentence or any part of the sentence, as approved by him, except a death sentence.

and will be elaborated in our brief on the merits.[3] In our view, the present case does not add any significant new dimension to these issues; separate plenary review is therefore unwarranted. Under these circumstances we submit that disposition of petitioner's challenge to the lawfulness of the commutation order be deferred pending this Court's resolution of *Schick* v. *Reed*.

2. Petitioner's other claims are insubstantial and do not warrant further review.

a. Petitioner contends that the law officer's refusal to grant his motion for a change of venue or, alternatively, for the appointment of a court-martial board from a different command, constituted a denial of his right to a fair trial (Pet. 5-7). He argues that the inhabitants of Okinawa were inflamed by the offense in question (the rape and murder of a five-year-old Okinawan girl) and that his Commanding General adopted a policy—which allegedly influenced the court-martial board—of convicting and executing petitioner as a gesture of American goodwill to the local populace. In support of these assertions, petitioner points, *inter alia*, to Okinawan newspaper articles about his case and the records of pre-trial meetings called to discuss several recent rape cases.

We note at the outset that petitioner's claims are not within the scope of appropriate federal review, since they have been "fully and fairly" considered by the

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[3]We are sending to counsel for petitioner copies of our opposition in *Schick* v. *Reed*. When our merits brief is filed, we will serve a copy on petitioner.

military tribunals. Indeed, in *Burns* v. *Wilson*, 346 U.S. 137, this Court declined on this basis to review the same kinds of claims presented here—including the argument that "the trial was conducted in an atmosphere of 'hysteria' because the crime had been particularly brutal and the authorities had 'created' a demand for vengeance" (346 U.S. at 143). As the district court observed (Pet. App. 3, pp. 17-18), each of petitioner's arguments was "given full and fair consideration at each military level of review." Accordingly, it is not the duty of the civil courts to "re-examine and reweigh each item of evidence" (346 U.S. at 144) relevant to petitioner's claims. See also *Parker* v. *Levy*, No. 73-206, decided June 19, 1974, slip op. pp. 26-27.

In any event, the record does not indicate that pretrial publicity or "command influence" prejudiced the court-martial board. After a full examination of the prospective court-martial members, the defense accepted the panel—a circumstance which suggests that petitioner's allegations of prejudice are insubstantial.[4] See *United States* v. *Moran*, 236 F. 2d 361 (C.A. 2), certiorari denied, 352 U.S. 909; *Allen* v. *United States*, 4 F. 2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597; *United States* v. *Fairchild*, 435 F. 2d 972 (C.A. 10).

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[4]Each court-martial member stated during voir dire (Tr. 5-33) that he had consciously avoided reading about and discussing this case. Defense counsel asked each member the following questions:

1. "Do you know if there is an intense feeling among the native population [regarding this case]?"

2. "Have you considered the implications that a finding of not guilty would have on the native population?"

Petitioner's allegations that the court-martial panel was prejudiced by the political atmosphere in Okinawa were thoroughly analyzed by the Court of Military Appeals, which concluded—after an extensive examination of the record (9 U.S.C.M.A. 757-763)—that the denial of petitioner's alternate motions was not an abuse of discretion. We rely here on that discussion by the Court of Military Appeals and note, by way of summary, the court's conclusion (9 U.S.C.M.A. 761-762):

> A reading of the transcripts of the [Ryukyuan-American Community Relations Advisory] Council meeting and the [Commanding General's September 21, 1955] staff conference leaves the conviction that General Moore was not panicked by the civilian community's outrage at the crimes. He shared their abhorrence, as would any normal person. But plainly his abhorrence of the crimes did not result in a determination to convict the accused regardless of the evidence. Rather he insisted that all accused, including the Ryukyuan charged with rape, would be given "a fair and impartial trial." * * *
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> * * * The record shows that General Moore was concerned with the problems highlighted by these crimes. * * * But it does not show he was

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3. "If you knew that the convening authority, General Moore, would be faced with complex political problems as a result of an acquittal, would this consciously or unconsciously influence your vote?"

4. "Do you think it will improve relations with the native Okinawans if the accused is found not guilty?"

All of the court members answered the first three questions in the negative and, as to the fourth question, stated that they did not know what effect an acquittal would have on the local populace.

> prejudiced against the accused. It does not show he intended to influence the court-martial which would try the accused or that he desired a conviction or the imposition of a particular punishment as a means of stilling the civilian community's outcry. There is, therefore, no basis for the accused's assertion that, because of his position as Deputy Governor and his statements before his staff and the Advisory Council, General Moore was disqualified from acting in the case. And there is no basis to support the accused's contention that General Moore asserted command influence upon the court-martial.

Similarly, after reviewing the transcript of a press conference held by the Staff Judge Advocate—upon which petitioner also relies to demonstrate "command influence"—the court found "nothing to support the contention that the interview was used as a means of influencing the court-martial which tried the case or that it had that effect" (9 U.S.C.M.A. at 762). And with regard to the allegedly prejudicial press coverage, the court noted further (*id.* at 762-763):

> * * * [W]hatever tension was created in the civilian community was not directed against the accused but against American administration of the Islands. This is not the kind of tension that demanded conviction of the accused by an American court as the sine qua non for its release. Be that as it may, the attitudes of the civilian populace did not affect the court-martial. Several times in the course of his argument defense counsel admitted that the court members "at this time" might not be aware of the feelings of the native population.

Under these circumstances petitioner cannot reasonably argue that his trial was conducted in an atmosphere so

prejudicial as to deprive him of constitutional rights.[5] See *United States* v. *Augenblick*, 393 U.S. 348, 356.

b. Petitioner also contends that his Sixth Amendment right to a unanimous verdict was violated because the concurrence of only two-thirds of the court-martial members was sufficient to convict.[6] This contention is without merit. This Court has long held that servicemen are excluded from the constitutional right

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[5]*Rideau* v. *Louisiana*, 373 U.S. 723, on which petitioner relies (Pet. 7), is inapposite. There, the Court held that it was "a denial of due process of law to refuse the request for a change of venue, after the people of [the] Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged" (373 U.S. at 726). There, moreover, the people so exposed were those from among whom the jury that tried Rideau was chosen.

[6]Article 52(a)(2) of the U.C.M.J. provides that in cases where the death penalty is not mandatory (as here), a concurrence of two-thirds of the members present is necessary for conviction; Article 52 (b)(1) provides that "[n]o person may be sentenced to suffer death, except by the concurrence of all the court-martial members present * * *." The record of trial in this case does not indicate that the verdict of guilt was in fact not unanimous (Tr. 387-388, 395).

[7]Nor, contrary to petitioner's suggestion (Pet. 10), do the Federal Rules of Criminal Procedure apply to military courts. See Wright, *Federal Practice and Procedure* §872, n. 19.

to trial by jury.[7] See, *e.g.*, *Kahn* v. *Anderson*, 255 U.S. 1, 8; *Ex parte Quirin*, 317 U.S. 1, 40-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127; *O'Callahan* v. *Parker*, 395 U.S. 258, 263; see also *United States* v. *Greene*, 20 U.S.C.M.A. 232; Schiesser, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 Catholic U.L. Rev. 171 (1966); Henderson, *Courts-Martial and the Constitution: the Original Understanding*, 71 Harv. L. Rev. 293(1957).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.